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No. 82-1005

In the Supreme Court of the United States

OCTOBER TERM 1982

CHEVRON U.S.A. INC., a corporation,
Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
ANNE M. GORSUCH, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES CITED

Page

Case

Alabama Power Co. v. Costle,
636 F.2d 323 2

Statute

Clean Air Act:

Section 111(a)(3) (42 U.S.C.
§ 7411(a)(3)) 4

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Chevron U.S.A. Inc., a corporation,
Petitioner,

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Natural Resources Defense Council, Inc.,
Citizens For a Better Environment, Inc.,
Northwestern Ohio Lung Association, Inc.,
Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, et al.,
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PETITIONER'S REPLY BRIEF

Respondents avoid the crucial question whether the holding of the Court of Appeals -- that EPA has no authority to use the bubble concept in nonattainment areas -- conflicts with the prior decisions of that court. Respondents' only efforts to explain away that conflict are based upon the erroneous assertion that "difference between program purposes" (R.Br., pp. 7-8, n. 14) accounts

for the conflicting results. But the point is that the purpose of the non-attainment provisions involved here is the same as that of the provisions in Alabama Power, where the Court of Appeals approved EPA's use of the bubble concept (Pet., p. 8).

This Court should resolve this conflict. The suggestion by respondents that this is an ordinary "intra-circuit conflict" which should be left to the circuit is without merit: Respondents admit that review of clean air regulations is of national importance (R.Br., p. 6, n. 11). The fact that Congress has assigned these cases to the D.C. Circuit for initial consideration certainly does not immunize that Circuit's decisions from review by this Court. Review by this Court is essential to prevent further havoc in the national enforcement of the Clean Air Act.

There is likewise no basis for the suggestion that review is unnecessary because of the speculative possibility of

future Congressional action. Respondents ignore the dangerous precedents which would result if erroneous Court of Appeals' opinions were always left unreviewed because of the possibility of Congressional "review" of those opinions. Moreover, the fact is that Congress has not acted even though it has been considering revision of the Clean Air Act for more than two years.

Contrary to respondents' assertions (R.Br., pp. 24-26), review by this Court will not adversely affect public health. The existing EPA regulations allow a state to issue construction permits only if the state has demonstrated to EPA that its overall air quality plan for the state assures reasonable further progress toward meeting air quality standards (Pet., pp. 3, 13-14). Thus, the bubble concept may be used only as part of a state program which meets the goals and standards of the Clean Air Act. Moreover, under the EPA regulations in question, a project would be allowed to proceed only if any net,

cumulative emission increase from a plant is below the maximum levels which Congress has found to be acceptable[1] (Pet., pp. 3-4).

On the merits, respondents totally ignore the fact that the EPA regulations in question simply define "stationary source" using the precise definition in section 111(a)(3) of the Clean Air Act (Pet., p. 11). Respondents do not, and cannot, defend the holding of the Court of Appeals that EPA committed a per se violation of the Act by conforming the EPA definition to that in the statute.

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[1] Respondents misstate the EPA regulations in question (R.Br., pp. 4-5, n. 9). The regulations allow modifications only if the net cumulative emission increase is below de minimus levels (40 C.F.R., Part 51, Appx. S, ¶ II.A.6., 40 C.F.R. § 52.24(f)(6)). The suggestion that a refinery owner could build new storage tanks increasing hydrocarbon pollution by 40 tons each year is simply incorrect; the regulations would only allow a total 40 ton increase for the entire refinery over a five-year period.

It is also significant that respondents virtually ignore the construction moratorium in nonattainment areas; unless the decision below is reviewed, that moratorium will ban all plant expansions or modifications in which a proposed piece of equipment would increase emissions, even if the expansions or modifications would reduce emissions from the plant as a whole, employ state-of-the-art emission control techniques, and demonstrate existing facility compliance (R.Br., p. 13).

Respondents' need to engage in an extensive discussion of legislative history is a virtual concession that the Court of Appeals opinion, which attempted to establish a "bright line test" is

erroneous and confirms that plenary review by this Court is warranted.

Respectfully submitted,

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